(16) 1075

N. J. Court of Errors & Appeals

State of New Jersey, Defendant in Error, vs. Harry Hartman, Plaintiff in Error.	Writ of Error to Supreme Court.

Brief on Behalf of Defendant-in-Error

The plaintiff in error was tried in the court of Special Sessions at Paterson, New Jersey, before the Hon. Joseph A. Delaney, Judge of the Court of Quarter Sessions, on an indictment, No. 478, for rape (S. of C. 8). The plaintiff in error, having been found guilty, was sentenced to be confined in State Prison at hard labor for a maximum term of nine years and a minimum term of five years.

The Supreme Court affirmed the conviction, in a per Curiam opinion. (Vol. VI. N. J. A. R. No. 10, p. 131.

The indictment charged the plaintiff in error with having, on the fourteenth of April, 1925, ***in the City of Clifton,*** committed an assault upon Anna Prell, and forcibly and against her will did ravish and carnally know the said Anna Prell.

At the time this indictment was tried, there was in existence another indictment against the same plaintiff in error, No. 479, (S. of C. 11). This indictment, at the time of the trial of indictment No. 478, had not been moved and, in fact, was never moved for trial, this latter indictment

having been nolleprossed on the motion of the Prosecutor, as will appear (S. of C. 20). It will be observed that indictment No. 479 charges the plaintiff in error with having on the fourteenth day of April, 1925, ***in the City of Paterson, New Jersey,*** committed an assault upon the same Anna Prell, and did forcibly and feloniously ravish and carnally know her. It will be observed that the two indictments were not for the same offense. The first referred to, indictment No. 478, charges the crime with having been committed in the City of Clifton. The second indictment charges a crime with having been committed in the City of Paterson.

During the course of the trial of indictment No. 478, and after both the State and the defense had rested, counsel for the defendant argued (S. of C. 19) that there were two indictments, that is, No. 478 and No. 479, apparently for the same offense, committed at the same time, by the same defendant, upon the same complaining witness, but the State had only moved the trial of the one indictment, No. 478. The Prosecutor then moved that the second indictment, No. 479, charging an entirely different offense, be nolleprossed, which motion was granted. Subsequently, plaintiff in error then moved for a direction of a verdict of acquittal in connection with indictment No. 478, which was the indictment upon which the plaintiff in error was being tried, upon the ground that the action of the Prosecutor in having moved the court to nolleprosss indictment No. 479, which was not the indictment that the plaintiff in error was being tried upon, acted as a discharge or acquittal of indictment No. 478 upon which defendant was then being tried, the contention of the plaintiff in error being that the Prosecutor having moved the court to nolleprosss indictment No. 479 before the court had passed judgment upon the guilt or innocence of the defendant in connection with indictment No. 478 acted as an acquittal or discharge of the plaintiff in error on the charge of the indictment No. 478.

The defendant in error maintains that the action of the court in nolleprossing the second indictment, being No. 479, did not act or operate as a discharge or an acquittal of the plaintiff in error in connection with the charge in indictment No. 478.

I.

PLAINTIFF IN ERROR WAS NOT TRIED AND CONVICTED ON THE INDICTMENT WHICH WAS NOLLEPROSSED.

The brief of plaintiff in error, Point I, advances as an argument for a reversal a point not before the court for consideration. The point is made by the plaintiff in error that the effect of nolleprossing an indictment at the close of the trial of defendant's case, is, in legal effect, an asquittal in connection with all indictments arising out of the same act under the rule as plaintiff states it as autrefois acquit. Defendant in error will not attempt to take up the time of the court by arguing the soundness of the principle advanced by the plaintiff under this point, because the point raised is not to be considered in the case under review. Plaintiff in error was con-

victed on indictment No. 478, (S. of C. 10) and on the conviction of this indictment this appeal has been taken. At the close of the case and before the Judge has passed judgement on the guilt or innocence of the plaintiff in error, the Prosecutor moved the court to nolleprossanother indictment which was not being tried known as No. 479 (S. of C. 11); this latter indictment charged an entirely separate and distinct offense against the plaintiff in error, in other words, the indictment upon which the plaintiff in error was standing trial charged the plaintiff in error with the commission of rape ***in the City of Clifton.*** The indictment which was nolleprossed, No. 479, charged the plaintiff in error with the commission of rape ***in the City of Paterson.***

On page 3 of the brief of plaintiff in error, the statement is made that the State moved the trial upon the aforementioned ***indictment.*** This is a mis-statement, as will appear upon an examination of the State of the Case. Only one indictment was moved and tried, being indictment No. 478. The plaintiff in error under this point makes the further statement that the complaining witness for the State testified that there was but one assault committed upon her and that the plaintiff in error had rested his case after offering the two indictments in evidence whereas it will be observed upon a reading of the State of the Case, charging the plaintiff in error with the commission of rape upon the same woman on the same day, one offense having been charged as being committed in the City of Clifton and the other in the City of Paterson. The plaintiff in error further states

in his brief that the Prosecutor of the Pleas, realizing the effect of such sworn testimony, moved to nolleprossone of the indictments. In other words, it will appear that the plaintiff in error, under this point, wants the court to conclude because there were two indictments against the defendant that the offer of evidence of such two indictments by the defendant was in effect a direct contradiction of the complaining witness's story that only one offense was committed. The defendant in error fails to see how this point can be well taken because the mere fact that two indictments had been found against the defendant for the commission of the same character of crime by the plaintiff in error against the defendant in error, one indictment alleging the offense in ***one City*** and the other indictment alleging the offense in ***another City,*** should not be considered in the form of contradictory evidence of the complainant's story that only one offense was committed, for it may properly be concluded that the reason the Grand Jury found two indictments was because the testimony offered before the Grand Jury might have disclosed that the complaining witness was unable to state definitely, before that body, whether the crime was committed in the City of Paterson or the City of Clifton, and the Grand Jury realizing the effect of such uncertainty decided to find an indictment charging the offense in the City of Clifton, and also an indictment charging the offense in the City of Paterson.

It will be observed on page 4 of the brief of plaintiff in error, the statement is made (lines 1 to 8 inclusive) that the nolleprossing of one of the indict-

ments charging the crime of rape, alleged to have been committed on the same date as the other indictment and upon the same person by the plaintiff in error operated as an acquittal and that therefor it was illegal to find the defendant guilty on the remaining indictment. The indictment upon which the defendant was convicted alleged an offense committed at an entirely different City than the City where the other indictment, which was nolleprossed, alleged the crime was committed.

The plaintiff in error under Point 1, on page 4 of brief quotes an extract from the opinion in the case of the State v. Cosgrove, 135 Atl., page 871, at page 872. The reasoning of the court in this case in connection with the point made by the court at page 872 dealt with an entirely different subject than the position taken by the plaintiff in error in connection with his reasons why his conviction should be reversed. The extract of the Court's opinion as referred to on page 4 of the brief in the case of the State v. Cosgrove had to do solely with the question as to whether or not a person convicted or acquitted of a crime could be charged by a second indictment with another crime which was the product as the same identical act as occurred in connection with the crime charged upon which the defendant was either convicted or acquitted. As for example, in the case of the State v. Cooper, 13 N. J. L., page 361, the defendant was indicted for murder. He pleaded a prior conviction of the crime of arson. It appeared that, having set fire to the dwelling house, the person, subject of the indictment for murder, was burned to death as a result of the arson. The court sustained the plea of autrefois convict as a bar to the indictment for murder upon the ground that both crimes were the direct product of the same act.

The court, in the case of State v. Cosgrove, in referring to the case of State v. Cooper, said on page 871 that:

> "Of course, it is manifest that under an indictment for arson, there could not properly be a conviction for the crime of murder."

It will be further observed on page 5 of the brief of plaintiff in error the statement commencing on line 26:

> "It is undisputed that the defendant was charged with two crimes identical in character, date, county and person."

This statement, of course, is true as far as it goes, but the further fact remains that the two indictments charged offenses not only of the same date, county and person but in two entirely different cities, indictment No. 478 charging the offense in the City of Clifton and the County of Passaic, and indictment No. 479 charging the offense in the City of Paterson and County of Passaic.

On page 6 of the brief of plaintiff in error, commencing on line 1, the statement is made that an objection was made and an exception duly allowed.

An examination of the State of the Case, page 20, commencing on line 14, refers to the action taken by the plaintiff in error in connection with the position taken by the Prosecutor in moving to have indictment No. 479 nolleprossed. It is stated, commencing on line 14, that

> "Counsel for the defendant then moved for the direction of an acquittal upon the ground that the nolleprossing of that indictment, viz: No. 479, ipso facto, acted as a discharge or acquittal of the indictment, viz: No. 478, upon which the defendant was then being tried. The Court permitted counsel to submit briefs and determined that the nolleprossing of the indictment No. 479 had no effect upon the indictment No. 478 upon which the defendant was tried and convicted."

It will be observed that no exception was taken to the ruling of the court and, as previously stated, the statement made by the plaintiff in error in his brief on page 6, commencing on line 1, that objection was made to the course taken and an exception duly allowed is not a correct statement of the fact.

On page 4 of the brief of plaintiff in error, reference is made to the Statute of New Jersey (P. L. 1898, page 893, Section 70 amended Laws of 1917, page 22). The plaintiff in error contends that this law would prevent the trial upon an indictment found after an indictment for the same offense committed at the same time and place, had been nolleprossed. The Prosecutor agrees that in so far

as the nolleprossing by a rule of court of an indictment is concerned, where the proceedings taken are in conformity with Section 70 are concerned, the nolleprossing of such an indictment would act as an acquittal upon the indictment that had been nolleprossed, but the State does not understand that this law would prevent the prosecution from proceeding to try the same defendant on another indictment that may have been found for the same crime, the effect of Section 70 being to prevent the State from taking any further proceeding upon the indictment that had been nolleprossed in accordance with the provisions of Section 70.

The plaintiff in error under Point I, on pages 8 and 9, cites cases which have to do solely with the question of the nolleprossing of an indictment which is the subject matter of the trial, and on page 9, commencing on line 25, the plaintiff in error says:

> "So here, we might say that after the evidence was all in, and the case closed, there being no jury, the nolleprossing of an indictment, charging the plaintiff-in-error with the exact crime, acted as an acquittal, and, therefore, he was placed in jeopardy twice when the Court found him guilty on a similar indictment, and sentenced him to prison."

Again the defendant in error states that the indictment that was nolleprossed was not the same indictment upon which the defendant was standing trial at the time the other indictment was nolleprossed.

Bouvier's Law Dictionary, Rawle's Third Revision, Vol. 3, page 2352, under the heading of Nolle Prosequi, it is stated:

> "The effect of a nolle prosequi, when obtained, is to put the defendant without day; but it does not operate as an acquittal; for he may be afterwards re-indicted, and, it is said, even upon the same indictment fresh process may be awarded; 6 Mod. 261; Com. Dig. Indictment (K); Con. v. Wheeler, 2 Mass. 172; State v. Thornton, 35 N. C. 256. See 3 Cox, C. C. 93; Williams v. State, 57 Ga. 478; State v. Primm, 61 Mo. 173."
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> "'It is for the prosecuting officer to enter a Nolle Prosequi in his discretion; State v. Thompson, 10 N. C. 613; but in some States leave must be obtained by the court; Anonymous, 1 Va. Cas. 139; State v. Roe, 12 Vt. 93."

Joyce in his Treatise on law governing indictments on page 127 says:

> "A special plea in abatement, alleging the pendency of another indictment against the accused for the same offense, is not a good plea where it appears that a nolle prosequi has been entered upon the first indictment. Jones v. State, 115 Ga. 814, 42 S. E., 271; Lascelles v. State, 90 Ga. 347, 372, 16 S. E. 945, 35 Am. St. Rep. 216, holding that where the court has allowed the solicitor-general to enter a nolle prosequi before putting the accused on trial, the latter, when arraigned

upon a bill of indictment subsquently found and returned by the grand jury for the same offense cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former bill by nol. pros. Zachary v. State, 7 Baxt. (Tenn.) 1, holding it no error to overrule a motion to quash the second indictment."

"A plea that a former indictment against the defendant for the same offense, and in which there were no fatal defects, was nol. prossed by the court against the consent of the defendant, is properly overruled. Bird v. State, 53 Ga. 602."

"So in a case in Kentucky, where the accused pleaded the dismission of a former indictment for the same offense it was held that the dismission of the first indictment by the prosecuting attorney, with the presumed consent of the court, even after the jury was sworn to try the case, was no bar to the last indictment, and the court declared that, there having been no trial, the accused was not in the constitutional sense either acquitted or put in jeopardy. Wilson v. Commonwealth, 2 Bush. (Ky.) 105."

Where there are fatal defects in an indictment or in the organization of the Grand Jury by which it was found and a new one is preferred, it is not necessary that the first indictment shall be quashed before the second is found. Perkins v. State, 66 Ala. 457, holding that the better and more usual practice is to the contrary. See Nordlinger v. State, 24 App. D. C. 406."

"In the application of the rule that under such a statute the finding of a second indictment does not operate ipso facto as a quashal of the first but merely suspends it until some positive action has been taken which quashes the one first found the quashal of the second indictment only does not operate as a quashal of the first but in such a case the one first found is revived, the obstacle which caused its suspension having been removed. State v. Melvin, 166 Mo. 565, 66 S. W. 534."

The State v. Harold J. Faulks, Supreme Court, 97 N. J. L., page 408.

On pages 410 and 411 it is cited by the court in its opinion that:

"The motions to quash and in arrest of judgment were properly denied. As to the motion in arrest of judgment, it may be sufficient to say that it is elementary law that such a motion can only be made upon matter apparent upon the face of the strict record, and that there is nothing in the present record to indicate the pendency of any former criminal proceeding for the same cause. This is apart from the merits of the point which, however, we consider is not well taken. It seems to be settled law that the pendency of another indictment against the defendant for the same offense is in general no ground for quashing, the criminal law not forbidding there being against one person two similar

indictments at the same time. 1 Bish. N. Cr. Pro., section 770; 1 Bish. N. Cr. L., Section 1014, paragraph 3, and cases cited. The pendency of an indictment is said not to constitute jeopardy. 16 C. J. 237. It may be that the State can be compelled to elect on which indictment to proceed. 22 Cyc. 410. In 1 Chit. Crim. L. 301, we find that in a case where there was a joint indictment against two for perjury, which on the trial the court inclined to think bad, and the trial was postponed, pending which a separate indictment against one of the parties was preferred, the court refused to quash the latter indictment, no vexation appearing. This passage of a well know text book is almost precisely in point, and, with the other authorities, satisfies us that in the absence of any case of vexation appearing, a defendant is not entitled to have an indictment against him quashed on the mere ground that another indictment in the same cause is pending against him, even though trial thereon may have been begun and been postponed for reasons satisfactory to the court."

Cunningham v. State, 117 Ala., 59, 23 So. 693, holding that:

"Where a demurrer to an indictment is sustained and the defendant declines to consent to the amendment of the indictment, the court has authority, under the statute (Code of 1896, section 4918; Code of 1886, section 4390), to order another indictment to be pre-

ferred at the same or a subsequent term, and after directing that a new indictment be preferred at the next term, the court has the power to change the order on the succeeding day of the term, so as to direct that the second indictment be preferred at the then present term, the defendant being absent at the time of making the change."

Terrill v. Superior Court of Santa Clara County (Col. 1899), 60 Pac. 38, 516, construing section 1008 of the Penal Code as amended in 1880, and which provided as follows:

"If the demurrer is allowed the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to another grand jury, or directs a new information to be filed; provided, that, after such order or resubmission, the defendant may be examined before a Magistrate, and discharged or committed by him, as in other cases."

State v. Evans, 111 Iowa, 80, 82, N. W. 429, holds that:

"Where an indictment for committing a liquor nuisance was set aside as defective and judgment was entered that the cause be re-

submitted to the grand jury, that the petit jury impaneled be discharged and that defendant recover costs, that such judgment was not a final judgment from which an appeal could be taken under Code Section 5448, and that it did not discharge defendant or exonerate his bail under Code section 5331."

Commonwealth v. Swanger, 108 Ky. 579, 57 S. W. 10, decided under Criminal Code of Practice, Section 170, provides that:

"Where a demurrer to an indictment is sustained because of the failure of the indictment to charge facts essential to a good indictment, 'the case may be submitted to another Grand Jury and an order to that effect may be made by the court on the record.' This provision was held to confer upon the court the power to exercise its discretion in such a case and it was decided that the discretion was not abused by the refusal to so submit an indictment for perjury where the alleged false testimony was not necessarily material in determining the defendant's guilt or innocence of the charge on which he was tried when the testimony was given. Compare Commonwealth v. Shelby, 18 Ky. Law Rep. 781, 38 S. W. 490."

POINT II.

THE VERDICT IS NOT CONTRARY TO THE WEIGHT OF EVIDENCE.

The crime of which the defendant was convicted was that of rape in that the plaintiff in error had, with force, in the City of Clifton, County of Passaic, and on the 14th day of April, 1925, committed an assault upon Anna Prell and did then and there forcibly and against her will ravish and carnally know her. From a reading of the testimony of Anna Prell (S. of C. 13 and 14) it will be clearly observed that the plaintiff in error did commit the crime as charged against him. The complainant, Anna Prell, testified among other matters that when she was in the bus operated by the plaintiff in error, the latter turned the bus up a side street, pulled over to the side of the road and put the lights out, and then Miss Prell tried to get out of the bus but the defendant grabbed her and that she screamed and hollered but as it was a stormy night and the bus windows and doors were closed, she was unable to attract any attention and assistance, and after the plaintiff in error had taken hold of her the plaintiff in error wrestled with her and threw her to the floor of the bus and that she fought with him up and down but to no avail, and while struggling between the floor and the seat, he raised her clothes, opened his trousers and placed his privates in her privates and at that time she was then in a semi-conscious condition, and he then drove the bus back about a block to the corner of Main and Crooks Avenue at which point she had sufficiently regained her composure to get out of the bus and at that point she got on

another bus and went to Paterson to her home and she cried and was hysterical all night long and attracted the attention of Mrs. Invidiato who, upon hearing her story, sent for a doctor on the following day. The doctor arrived at her home on the morning of the 16th and made an examination of Miss Prell and at the trial she identified the plaintiff in error as the man who had attacked her.

Alma Ponse testified for the State (S. of C. 14) that she had accompanied Miss Prell to the bus and that she had heard Miss Prell ask the driver, the plaintiff in error, if the bus went to Paterson and Miss Ponse heard him say in answer thereto, "Get in and I will take you there," and she, Miss Ponse, also identified the plaintiff in error as the driver of the bus.

Lillian Invidiato testified among other matters and things (S. of C. 15) that the complainant, Miss Prell, was a very good girl and of a very quiet disposition and of extremely good habits, that Miss Prell had worked for her as a domestic and further that on the morning of April 15th (the morning following the night that the complainant testified attack was made upon her by the plaintiff in error) she observed Miss Prell was hysterical and that she had apparently been crying all night and that Miss Prell had told her what had happened and that she, Lillian Indiviato, on account of the girl's condition called Dr. Manley and that she was present when Dr. Manley examined the girl on the 16th of April, 1925, and she saw the marks on Miss Prell's neck and shoulders and also black and blue marks on

Miss Prell's thighs and that there were five marks on each thigh in the shape of the fingers, four marks on the top of each thigh and one mark on the inside of each thigh. She also testified that she noticed her clothes were torn and mussed and that her bloomers contained stains of blood and other matter. She reported it to the Passaic police and was present when Miss Prell picked the photograph of the plaintiff in error, Hartman, out of a group of bus drivers.

Cosmo Invidiato testified (S. of C. 16) corroborating his wife's testimony as to the appearance of the complainant, Anna Prell, in the morning.

Dr. Thomas Manley testified (S. of C. 16) that he was a regularly licensed physician, practicing at Paterson and that on the 16th of April, 1925, he examined Miss Prell and that it was his opinion that she had been attacked and that the hymen was torn, that the tear was recent and that in his opinion she was a virgin before that time. He also testified to having observed bruises and contusions about her neck and shoulders and that he also observed on both thighs black and blue marks which he described as having been made by the fingers, four marks being on the upper part of the thigh and one mark on the lower side of the thigh. He also testified that he treated her for the hysterical condition in which he found her.

Dr. Frank R. Sandt testified (S. of C. 16) that he was a regularly licensed physician of the State of New Jersey, that he was a pathologist and had made many examinations of blood, blood stains, se-

men, urine and similar matter. That he examined the bloomers of Miss Prell and found that the red blood stains were human blood stains and that there were also on the bloomers stains caused by male semen. He also testified that the stains were such as would come from the tearing of the hymen and were not from menstruation and stated the reasons for his conclusions.

Detective Edward Boyko testified (S. of C. 15) that he was a member of the Passaic Police Department and that the plaintiff in error admitted to him that he had had intercourse with Miss Prell but said it was with her consent.

John Corkery testified (S. of C. 15) that the defendant, while being brought from Passaic to Paterson, pointed out to him the place, not far from Crooks Avenue, in the County of Passaic, where he, the plaintiff in error, admitted having intercourse with Miss Prell, but that the plaintiff in error told him that Miss Prell had consented and that it was voluntary.

The plaintiff in error, Hartman, testified (S. of C. 17) among other matters and things to a story which is un-corroborated and which seems highly improbable in view of the physical condition of Miss Prell, and, further, in view of the fact that he had never known this woman before the night in question and maintains and admits that he had intercourse with her on the night in question, in fact he testified that he had had intercourse with her twice on the same night but that it was voluntary

and with her consent. When the testimony of the plaintiff in error was completed, the court said to the plaintiff in error: "Do you expect this court to believe that story?" As the defendant-in-error stated immediately above, the story of the plaintiff in error as given at the time of the trial seems highly improbable and hardly worthy of notice or belief.

It does not seem as though such a story is worthy of belief when one takes into account the physical condition of the girl after the story of the plaintiff in error that she voluntarily submitted to the plaintiff in error by agreeing to commit intercourse with him, twice on the same night, and further, the story does not seem at all worthy of a bit of belief when one takes into account the statement he makes when he says that after he had intercourse with her the second time, she asked him when he was going to get married and he replied "in about a year" and she then said: "I didn't think we was getting married that quick?" And then he asked her where she got the "we" stuff and she said "I thought you was talking about me", and that he told her he was going with a girl about a year and thought it was time to settle down.

This girl, the complainant, was about twenty-five years of age at the time of the commission of the crime. She had been in this country about two years having come from Germany and on the day of the crime she had been employed doing housework for Mr. and Mrs. Invidiato, the latter having testified that she worked for her as a domestic, was

a very good girl and of a very quiet disposition and of extremely good habits.

Dr. Manley testified that in his opinion she was a virgin before the attack made upon her by the plaintiff in error.

It does not seem at all possible that this complainant, in the darkness of the night, getting into the bus with the expectation of going to her home where she was employed in Paterson, and without any former acquaintance of any kind with the plaintiff in error, should agree within such a short time to submit to the plaintiff in error in the manner in which he testified she did by voluntarily having intercourse with him on two separate occasions on one night and then proposing or assuming an attitude that the plaintiff in error would marry her. His story is highly improbable, not worthy of belief, and the court rightfully assumed the attitude it did when it directed its remark to the plaintiff in error by saying: "Do you expect this court to believe that story?"

The defendant in error maintains that the verdict is consistent with the weight of the evidence, that the weight of the evidence conclusively proves, and without any question whatsoever, that the plaintiff in error did commit the crime of rape upon the complainant and that the court was correct in adjudging the plaintiff in error guilty of the crime as charged in indictment No. 478.

For the foregoing reasons, defendant in error respectfully submits that the judgment of the trial court in convicting the plaintiff in error should be sustained.

Respectfully submitted,

J. VINCENT BARNITT,
Prosecutor of the Pleas and Attorney for Defendant in Error.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

HARRY HARTMAN,
Plaintiff-in-Error.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

The plaintiff-in-error was tried in the Court of Special Sessions, Paterson, N. J., before the Hon. Joseph A. Delaney, Judge of the Passaic County Court of Quarter Sessions, on an indictment for the crime of rape. The plaintiff-in-error, having been found guilty, was sentenced to be confined in State Prison, at hard labor for a maximum term of nine years and a minimum term of five years.

A writ of error was sued out to the Supreme Court, which Court, in a *per curiam* opinion, dated January 31st, 1928, affirmed the judgment of the Passaic County Court of Quarter Sessions. From this judgment of the Supreme Court, a writ of error was sued out to the Court of Errors & Appeals.

There were two indictments, which charge the plaintiff-in-error with having, on the 14th day of April, 1925, committed an assault upon Anna Prell, and forcibly and against her will, ravishing

and carnally knowing the said Anna Prell. Both of these indictments charge the plaintiff-in-error with having committed the crime of rape, in Passaic County, on the said 14th day of April, 1925. At the trial, the Prosecutor moved indictment No. 478. During the trial of this indictment indictment No. 479, which charged the defendant with having committed this very act of rape on this very day, namely, April 14th, 1925, was offered in evidence by the Prosecutor, and thereafter, during the course of the trial, on motion of the Prosecutor, the Court *nolle prossed* this indictment. Subsequently, the plaintiff-in-error then moved for a direction of a verdict of acquittal on indictment No. 478, which was the indictment upon which the plaintiff-in-error was being tried, upon the ground that the *nolle prossing* of indictment No. 479 acted as an acquittal of Indictment No. 478, upon which the defendant was then being tried. The trial court reserved decision. Briefs were submitted, and subsequently, the Court convicted the defendant of the crime of rape.

It is contended that the Supreme Court erred in its judgment. The plaintiffs-in-error insist that the judgment of conviction should have been set aside by the Supreme Court for the reasons urged in that Court, and because of the harmful and prejudicial errors on the part of the Trial Judge in refusing to direct an acquittal, which matter is argued in this brief.

POINT I.

Where an order nolle prossing an indictment charging the crime of rape is entered by the court at the close of the defendant's case, the legal effect thereof is to acquit the person charged of all indictments arising out of the same act under the rule of Autrefois Acquit.

This point embraces Reason 3 of the assignments of error (Case, p. 21) and the specifications of causes for reversal under similar numbers (p. 22).

The State moved the trial upon the above-mentioned indictments and thereafter during the course of the trial and for the purpose of impeaching the State's complaining witness both of the indictments were offered in evidence (Case, p. 19, lines 28 to 30, p. 20, lines 1 to 30). The complaining witness for the State testified that there was but one assault committed upon her. The defendant rested his case after offering the two indictments in evidence. The Prosecutor of the Pleas, realizing the serious effect of such a contradiction in sworn testimony moved to *nolle prosse* one of the indictments for which an exception was taken, and the Court granted the motion made on behalf of the State and entered an order of *nolle prosse*. Counsel for the defendant then offered in evidence the order of *nolle prosse* contending that the same operated as an acquittal and a complete bar to any conviction under the doctrine of double jeopardy and *autrefois acquit*. The Court reserved decision and took the matter under advisement requesting briefs. It is now contended that grave error was committed on the part of the Trial Court.

A careful study of the law on this subject clearly establishes the fact that the *nolle prossing* of one of the indictments, charging the crime of rape alleged to have been committed on the same date as the other indictment and upon the same person by the defendant, operated as an acquittal and that thereafter it was illegal for the Court to find the defendant guilty on the remaining indictment.

The statute in this case (P. L. 1898, p. 893, Sec. 70, amended Laws of 1917, p. 22) in connection with the entering of a rule of *nolle prosse,* provides that such an order terminates and ends the proceedings on the indictment as against the defendant.

> " * * * and when such rule is entered all proceedings under said indictment as against the defendant therein named shall be at an end as fully as if the defendant had been tried and acquitted thereon."

With that provision in mind, it seems clear that in so far as that indictment was concerned the defendant was acquitted and that any conviction thereafter for the same identical act would be illegal.

State vs. Cosgrove, 135 At. 871, the Court held at page 872 as follows:

> "And again, in State vs. Mowser, *supra,* this Court reaffirmed the doctrine laid down in the Cooper case, holding that where both crimes were the product of the same identical act and there was a conviction or an acquittal under one of the indictments for the alleged crime, a plea of *autrefois convict,* or *autrefois acquit,* as the case may be, is a good plea in bar to the trial of the other indictment."

Citing:

Newman's Criminal Law, p. 267.

This exact proposition of law seems to be unknown perhaps in this State, but it has been a matter of decision in other jurisdictions, and the basis of these decisions is both logical and sound and clearly indicates the wisdom of the pronouncement of the law of these forums.

It will be noted that the common law has been changed with regard to the method of raising former jeopardy and the mere statement of fact is all that is required. This was done in the case at bar. There is no doubt that the identical offense is averred in both indictments.

The testimony of the complaining witness discloses that only one offense occurred (State of the Case, page 14). Two indictments were returned when the testimony of the State disclosed that only one offense had been committed. We submit that the *nolle prossing* of one indictment, *ipso facto,* acted as a discharge or an acquittal of the indictment upon which the defendant was then being tried.

We do not desire to be understood as contending that the *nolle prossing* of an indictment generally means an acquittal, and we desire to distinguish this case from any case reported in the state in so far as the effect of a *nolle prosse* is concerned. It is undisputed that the defendant was charged with two crimes identical in character—date, county and person. There is no doubt but that both indictments were offered in evidence by the defendant for the purpose of contradicting the complaining witness and only then was it that the Prosecutor moved to *nolle prosse* and the Court entered a rule of *nolle prosse.* Manifestly, its object was to destroy the legal efficacy of the indictment by *nolle prossing* so that the defendant would be denied the right of impeaching the credibility of the witness in so far as her testimony before the

Grand Jury was concerned. Objection was made to this course and an exception duly allowed. Immediately thereafter the Court entered an order granting a *nolle prosse* on Indictment No. 479, which was offered in evidence. In effect the result was this: The defendant was thereupon immediately acquitted of, under the statute, the charge in that indictment. The point was then made that the indictment was in all respects like the indictment which was moved and with which the defendant was then confronted on trial. The plea of the former acquittal, under the statute (Laws of 1917, Chap. 11, p. 12), operated as an acquittal and a bar to the further prosecution on said indictment.

We desire to call the Court's particular attention to the fact that the statutory *nolle prosse* is an entirely different proposition of law than the common-law *nolle prosse*. A *nolle prosse,* we find, under the statute operates as an acquittal. A *nolle prosse,* under the common law, was merely a formal declaration of record that there would be no further prosecution of the indictment *nolle prossed,* or any of the counts in the indictment.

In the case at bar, it must be noted that the two indictments were alike. At the close of the entire case, without any rhyme or reason, the Prosecutor *nolle prossed* the indictment charging this defendant with the same offense, in the same way, with the crime which he was then being tried for. The statute says that the *nolle prossing* of such an indictment is an acquittal. An acquittal of what? An acquittal of that crime pleaded in the indictment. When this occurs, the Court is immediately confronted with the plea of acquittal, a statutory acquital. We think the Prosecutor, in making the election which he did, of requesting a *nolle prosse* of an indictment at the point and

stage of the proceedings, and entering an order thereon, legally terminated, once and for all, that particular charge and we must insist that the statute means something when it says:

> "And when such rule is entered, all proceedings under said indictment, as against the defendant therein named, shall be at an end as fully as if the defendant *had been tried and acquitted thereon,*"

and terminated all proceedings *as against the defendant.*

The Legislature manifestly had in mind, when it enacted that legislation, what the operation and effect of a *nolle prosse* would be when a rule was entered thereon. The defendant had nothing to do with the entry of the rule. There was nothing to compel the Prosecutor to request such action at the stage of the proceedings when the same was requested. It was voluntary. Obviously, the object was to destroy the effect of impeaching the credibility of the State's witness with regard to the testimony which she gave before the Grand Jury, it being the thought of examining counsel that the witness must have sworn to two distinct offenses before that body. The witness denied that emphatically and said that she swore to but one crime and that only one attack was ever made. All are agreed that there was but one offense committed. That being true, it must manifestly be likewise true that the acquital of admittedly the only offense committed, is a plea in bar to further prosecution on an indictment covering the same offense and same subject-matter.

> "But by the great weight of authority, where the defendant is arraigned on a sufficient indictment and pleads, and the jury is

> impaneled and the plea of not guilty is entered, the dismissal of the indictment without the consent of the defendant amounts to an acquittal, and bars further prosecution for the same crime" (8 R. C. L., p. 152).

In the case of *State of South Carolina vs. Aaron R. Richardson, Appt.,* 35 L. R. A. pp. 238-239, it was held that the entry of a *nolle prosse* or the withdrawal of a case from the jury, after it has been charged therewith, amounts to an acquittal, and in the opinion of that case it was held that:

> "One of the settled rules of the common law was that no one shall be twice put in jeopardy upon the same charge. As is said in *Cooley Const. Lim.,* 2d ed., at pages 325, 326: 'One thing more is essential to a proper protection of accused parties, and that is that one shall not be subject to be twice put in jeopardy upon the same charge.' And, at page 327, the same author says: 'A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause.' The same doctrines are laid down in 1 *Bishop Crim. L.,* 6th ed. at Pars. 1013, *et seq.,* and are fully recognized in the leading case of *State vs. M'Kee,* I Bail. L. 651, 21 Am. Dec. 499."

In the same case, in page 239, it is held:

> "That the entry of a *nolle prosequi,* or a withdrawal of a case from the jury, after it has been charged therewith, amounts to an acquittal, for there is high authority for that view. In 11 *Am. & Eng. Enc. Law,* page 949, it is said: 'Before the jury is impaneled and sworn, the prosecuting officer may enter a *nolle prosequi* at his pleasure, and it will be no bar to a subsequent prosecution for the same act; but if it is entered after the jury is impaneled and sworn, without the consent of the defendant, it is equivalent to an acquital, and he cannot be again put in jeopardy for the same offense.' "

In the case of *State vs. M'Kee,* referred to in this opinion, and found in 21 Am. Dec. 499, O'Neall, J., uses the following language:

> "The solicitor having entered a *nolle prosequi* after the jury were charged, and they being discharged, without any lawful cause, upon which the prisoner can be remanded for trial a second time, it follows that he is acquitted."

So here, we might say that after the evidence was all in, and the case closed, there being no jury, the *nolle prossing* of an indictment, charging the plaintiff-in-error with the exact crime, acted as an acquittal, and, therefore, he was placed in jeopardy twice when the Court found him guilty on a similar indictment, and sentenced him to prison.

The case referred to is similar to the case at bar, with one exception, and that is, that there was no jury in this case, but the law is the same, and we respectfully submit that the plaintiff-in-error should be discharged, because it would be a violation of his constitutional rights, and in violation of the Constitution.

The situation presented here raises a constitutional question both under the State and Federal Constitution, namely, that the defendant is being subjected to double jeopardy which is made prohibitory under our fundamental law.

Article 5 of the amendments to the Constitution of the United States provides as follows:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Article 1, Section 10 of the Constitution of the State of New Jersey, provides as follows:

> "* * * No person shall, after acquittal, be tried for the same offense."

It seems that a reading of the provision in the New Jersey Constitution and the statute heretofore mentioned in reference to acquittal after a *nolle prosse* that a verdict on an indictment alleging the same facts would be trying that person for the same offense after an acquittal. The Constitution does not specify what constitutes an acquittal.

It therefore follows that a statute which defines an acquittal would govern that the facts in this case come clearly within the scope of the Constitution.

POINT II.

The verdict is contrary to the weight of the evidence.

The complaining witness, at the trial, testified that the plaintiff-in-error had committed only one assault upon her, and that that was against her will, but, nevertheless, at the trial, two indictments were offered in evidence, known as Nos. 478 and 479, both of which indictments alleged that the plaintiff-in-error had committed the crime of rape upon the prosecutrix. What was their import? Certainly, this Court would take judicial notice of the fact, that the Prosecutor would not have had two indictments returned, unless this girl had sworn to the fact that she had been twice assaulted on that date. This clearly corroborates the story of the plaintiff-in-error, because he testified that he had intercourse on that particular night, with the prosecutrix, on two separate occasions, and that both acts were absolutely voluntary on her part (see Case, p. 19, lines 12 to 22).

And again, the improbability of the truth of the complainant's testimony, that she was forcibly assaulted is magnified by the fact that the deeds complained of were committed within one block from the main thoroughfare between the cities of Paterson and Clifton, on which all sorts of conveyances, namely automobiles, buses, trolley cars, and the like are being driven with great regularity (see Case, p. 18, lines 10 to 22). Why was there no outcry? Why didn't the complainant call for a policeman, or why didn't she produce the driver of the second jitney bus that she got into? It is very strange that during all the supposed

struggles, the disturbances should not have been heard or perceived by any passerby.

Attention is also called to the fact that this young boy was an employee of the Public Service Railway Company. His character was excellent. It is very strange that she did not stop off to call a police officer, although she had to pass the police station to get to her home.

Attention of the Court is also called to the following situation:

The alleged assault was committed on April 14th, 1925, but it is very striking that a doctor did not visit the prosecutrix, until April 16th, 1925, two days later. Certainly, if prosecutrix were criminally assaulted against her will, on April 14th, a natural consequence would be for her to immediately make complaint to the police, and go to a doctor at once. In *State vs. Santo,* 121 Atl. 139 at page 141, the Court cited the following quotation from Roscoe's Criminal Evidence:

> "In a crime of this character, the party ravished, says Lord Hale, may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances * * * ."

In all the entire case, we submit there is not an iota of corroboration of complainant's story that she was ravished against her will. Her first witness, Alma Ponse, testified merely that she accompanied complainant to the bus of which Hartman was the driver (see Case, p. 14, line 32 to 41). This testimony is very meagre, and unenlightening, and goes for naught.

The next two witnesses, John Corkery and Detective Edward Boyko, called on behalf of the State, both swore that the defendant admitted having had intercourse with Miss Prell, but that defendant had stated to them that the said illicit relations were voluntary and had with her consent. Does this not corroborate the defendant's story? These witnesses of the State, called for the purpose of proving a carnal abuse, and on the contrary, they testified that the acts were voluntary.

The testimony of Mrs. Lilian Invidiato and of Cosmo Invidiato sheds no light on the complainant's story (Case, p. 15, lines 20 to 42; p. 16, line 1 to 4). Their testimony amounts to the fact that on April 15th, the day after, the girl's hysterical condition required the attention of a doctor, and one was called. It is most striking to note that in spite of Miss Prell's hysterical condition, and her story of the night before, she was not examined immediately by anyone, to say the least, a doctor, but that on the contrary, she was examined by a doctor on April 16th, two days later. Certainly, there could have been nothing alarming about the situation, if the immediate services of a doctor were not required.

Harry Hartman testifies, and describes in detail, a very important situation in this case; namely, this girl testified that this assault was committed on her in a bus of the Public Service Railway Company. He says this is untrue; that he took the bus when he had finished his trips, to the garage of the Public Service Railway Company, and he took his Ford coupe, and then took Miss Prell for a ride in the outlying districts, testifying exactly where he went, and that he stopped on two occasions thereafter, and had intercourse with the complaining witness. It may be singular to note that Hartman's record is absolute-

ly spotless. He was never arrested or charged with any crime before. This girl is a foreigner, having been in this country for two years. To convict the plaintiff-in-error on such a highly improbable story, in view of Detective Boyko's statement, would, in our opinion, be a miscarriage of justice. The most important factor in this case, in our opinion, is the fact that this girl testified that this assault took place within one block from one of the most thickly populated sections of the City of Clifton, where police officers are constantly patrolling, where trolley cars pass by continuously, where busses run very often, where automobiles are continually riding, a street which is well lit up, and coupled with the fact that she claims she got off the bus, and took another bus, right then and there, seems to be a story which is highly incredible, and almost unbelievable, and for these reasons, we respectfully request that the verdict be set aside, and for nothing holden, and if the Court should find that a *nolle prosse* of the indictment would be placing the defendant in double jeopardy, he should be acquitted.

The decision of the Supreme Court does not seem to indicate that the Supreme Court reviewed the weight of the evidence in this particular case. Their opinion is silent, although this point was raised in the Supreme Court, under Assignments of Error, No. 1, on Page 17, and also under Specifications of Reversal, Page 22, Reason 1.

We respectfully submit that the Supreme Court erred in affirming the conviction of the Trial Court for the reasons urged under the various points discussed in our brief and respectfully submit that its judgment should be reversed, as should the judgment of the Trial Court, and a venire de novo issue.

Respectfully submitted,

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